

Right to Marry

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ABSTRACT

The right to marry represents a fundamental human right, protected primarily for its significance in founding a family. Family has always been understood as one of the basic values in the life of an individual, but also one of the basic values of society, due to its great contribution in preserving social stability and development. This right is protected by a plethora of global and regional documents, among others the European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 12).

It is therefore the aim of this chapter to represent an incentive for further analysis of the right to marry, in light of current trends, and in particular of its limitations, such as the issues of marriageable age, consanguinity, number of spouses, consensus and capacity. The corollary principle of the equality of spouses, as emphasised in Article 5 of the Protocol 7 to the European convention represents a parallel *fil rouge*, since it is a *conditio sine qua non* in all considerations regarding marriage. Doctrinary considerations are complemented by references to relevant case law of the European court of human rights, while particular attention is devoted to selected topics with regard to the countries of Central and Eastern Europe, namely religious marriages, the issue of the aim of marriage, and divorce. The conclusion deriving from the analysis is that the cautious approach of the European Court, relying on European-wide consensus, or in other words the Court's choice to follow, and not to lead, is welcomed. Namely, the issue of marriage is inextricably linked to traditions of the states and the cautious approach should therefore be continued.

KEYWORDS

Right to marry and to found a family, Article 12 of the European Convention on Human Rights and Fundamental Freedoms, European Court of Human Rights, family law

1. Introduction

The right to marry represents a fundamental human right, protected primarily for its significance in founding a family. Family has always been understood as one of the basic values in the life of an individual, but also one of the basic values of a society as well, due to its great contribution in preserving social stability and development. In words of V. Puljiz, 'family is primary, multifunctional human group which has utmost

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importance in forming the life of an individual, as well as society'.¹ This paradigm is reflected in numerous human rights documents, such as the Universal declaration on human rights and the International covenant on civil and political rights,² or the Convention on the rights of the child.³

'Generally speaking, the function of marriage has always been the birth of offspring and the survival of society.'⁴ Contemporary societies witness two important processes in this regard, the first is the deinstitutionalisation of family and the second is the development of new family forms.⁵ V. Puljiz therefore correctly emphasises two basic aspects of family deinstitutionalisation: the first, an ever-growing number of individuals who do not consider marriage as the only form of common life of a woman and a man and the second, which changes of legal provisions contribute to the 'flexibilization of marital relationships', and among others is the liberalisation of divorce proceedings and the equalisation of marital and extra-marital unions.⁶

Demographic trends in Europe confirm such a conclusion. Namely, the number of concluded marriages is diminishing and its conclusion is often postponed.⁷ Today's marriages are concluded at a more mature age, but in present social and economic conditions, this does not mean they carry greater stability, in fact rather quite the opposite.⁸ There is a significant rise in the number of children born out of wed-

1 Puljiz, 2001, p. 11.

2 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Art. 16, para. 3 of the Universal declaration on human rights and United Nations, Treaty Series, vol. 999, p. 171, Art. 23, para. 1 of the International covenant on civil and political rights.

3 United Nations, Treaty Series, vol. 1577, p. 3, Preamble of the Convention on the rights of the child '...Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.'

4 Hrabar, 2024, p. 121.

5 Puljiz, 2001, p. 14. As noted by A. Korać, 'the marriage is transforming, not only because of the liberalisation of divorce still under way also today, but also for the fact that other institutes are approaching it in the terms of content: extra-marital union and the life partnerships of same-sex persons'. Korać Graovac, 2015, p. 802.

6 Puljiz, 2001, p. 14. Similarly, C. Sörgjerd points to the trend of liberalization of divorce proceedings which makes divorce more accessible, as well as to the notion of pluralism in civil status issues, meaning recognition of rights of unmarried and same-sex couples. Cf.: Sörgjerd, 2016, pp. 38–40.

7 E.g. around 1.9 million marriages and an estimated 0.6 million divorces took place in the European Union in 2022, according to the most recent data available for the EU Member States. These figures may be expressed as 4.2 marriages for every 1 000 persons (in other words the crude marriage rate) and 1.6 divorces for every 1 000 persons (in other words the crude divorce rate). Cf.: Eurostat, 2025.

8 Akrap, 2001, p. 98.

lock.⁹ All of the above is also influenced by another process, namely the ageing of population.¹⁰

As emphasised in the jurisprudence of the European court of human rights (further: ECtHR or simply the Court), ‘the institution of the family is not fixed, be it historically, sociologically or even legally’.¹¹ It is also of utmost importance

‘to distinguish between a marriage and a family. Namely that almost all conducted research show that family represents the greatest value for the majority of people, even whilst the marriage has become quite instable. Therefore, a discrepancy exists between the instability of marriage and the high value attributed to family as a basic social unit’.¹²

In this regard, A. Korać argues that despite the fact that marriage is still the basis of founding a family, a more contemporary approach moves away from the understanding that only married people can found a family.¹³

It is therefore the aim of this chapter to represent an incentive for further analysis of the right to marry, in light of the current trends. The corollary principle of the equality of spouses represents a parallel *fil rouge*, since it is a *conditio sine qua non* in all considerations regarding marriage.¹⁴

2. Contextual Analysis of the Right to Marry and the Corollary Principle of the Equality of Spouses in the Light of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention on Human Rights (furthermore referred to as ECHR, or simply Convention)¹⁵ is the ‘European charter of liberty’.¹⁶ As regards the right to marry, the fundamental provision is Article 12, which reads: Right to marry; ‘Men and

9 ‘The proportion of live births outside marriage has shown an increasing trend in the past decades, more than doubling since 1993 (17.7 %) when these data were first available in the EU. In 2022 this proportion was estimated at 42.2 %, meaning that 57.8 % of children were born inside marriage. This share reflects changes in patterns of family formation alongside the more traditional pattern where children were born within marriage. Extramarital births occur in non-marital relationships, among cohabiting couples, to lone parents and in registered partnerships.’ Eurostat: A rise in births outside marriage, Available at: Eurostat, 2025.

10 ‘On 1 January 2023, the EU population was estimated at 448.8 million people and more than one-fifth (21.3 %) of it was aged 65 years and over.’ Eurostat, 2024.

11 *Mazurek v. France*, Application no. 34406/97, Judgment 1 February 2000 (para. 52).

12 Puljiz, 2001, p. 15.

13 Korać, 1997, p. 340.

14 For a comparative analysis of ‘progressive’ European jurisdictions, namely Sweden, The Netherlands, Germany, France and Spain, regarding the principle of equality of spouses, cf.: Sörgjerd, 2016, pp. 5–12.

15 European Treaty Series – no. 005.

16 Modinos, 1962, p. 1108.

women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’

As argued by A. Korać, this right is hence twice limited – ‘For the first time concerning the age of persons, who have to be at the age of marriageable maturity. For the second time concerning the national legislations which regulate this area.’¹⁷ As emphasised in the decisions of the ECtHR, ‘the essence of the right to marry is the formation of a legal union of a man and a woman’.¹⁸ Namely, in its jurisprudence, well-established already almost half a century ago, the ECtHR emphasised that ‘the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family’.¹⁹

It should be concluded from the wording at the end of Article 12, concerning ‘this right’ in the singular form, that the right to marry and found a family constitutes only one, and not two separate, or distinctive rights. However, certain comments should be made in this regard.

Firstly, it should be said that ‘the right to found a family secured in Article 12 of the Convention exists only in marriage. The existence of a couple is fundamental in this sense’.²⁰ In this regard, R. Probert and A. Barlow argue that the traditional family resulting from marriage was a dominant family form at the time of the emergence of the ECHR, so it was logical and convenient to introduce the marriage-based family as a social unit regulated by the law.²¹

Secondly,

‘the ability to found a family is not a condition for marriage. In other words, the inability of a couple to conceive or parent a child could not be regarded as removing their right to enjoy the right to marry’.²²

17 Korać, 1996, p. 68.

18 *Jaremwowitz v. Poland*, Application no. 24023/03, Judgment 5 January 2010 (para. 60).

19 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986. (para. 49). Cf. also: *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment 27 September 1990. (para. 40), *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (para. 66).

20 Guide on Article 12, 2024, pt. 54. With reference to *X. v. Belgium and Netherland*, Commission, 1975.

21 Probert and Barlow, 2000, cited in Lucić and Grigić, 2015, pp. 57–84. Indeed, in the first family-law case before the ECtHR, *Marckx v. Belgium* (which concerned the status of a child born out of wedlock) the ECtHR itself recognised that ‘support and encouragement of the traditional family is in itself legitimate or even praiseworthy’. *Marckx v. Belgium*, Application no. 6833/74, Judgment 13 June 1979 (para. 40). As D. Hrabar emphasises, ‘It is the traditional family that maintains and improves social relations, while fostering the prosperity of society and human civilization’ and notes that ‘without family there is no society, since it is unrepeatable, irreplaceable form of human unity, comparable to nothing else’. Hrabar, 2024, pp. 122. and 127, respectively.

22 Guide on Article 12, 2024, pt. 55.

Therefore, the right to marry is guaranteed even if there is no chance of founding a family, for instance due to reasons of medical nature. Furthermore, the Court has confirmed that the right to found a family does not as such create a right to procreate or to have grandchildren.²³ In other words, neither Article 12 nor any other Article of the Convention guarantees the right to adopt or otherwise integrate into a family a child who is not a biological child of the married couple concerned.²⁴

Thirdly, such a concept does not mean that unmarried persons (notwithstanding their sexual orientation) are not protected with regards to their family life. The protection is simply provided in another provision of this Convention, namely in Article 8 guaranteeing the Right to respect the private and family life for heterosexual

23 Guide on Article 12, 2024, pt. 56. Cf. e.g. the case of *Margarita Šijakova and Others v. The Former Yugoslav Republic of Macedonia*, Application no. 67914/01, Decision 6 March 2003, concerned the claims of five applicants – mothers whose children joined the monastic order of the Macedonian Orthodox Church. The applicants claimed that numerous fundamental rights guaranteed to them were breached. Among other, they complained that they were ‘prevented from founding a larger family and having grandchildren because their children in holy orders have taken a vow of celibacy’ (para. 3). In that regard, the Court reiterated that ‘the right to have grandchildren or the right to procreation is not covered by Article 12 or any other Article of the Convention’ and that the complaint, as being incompatible *ratione materiae* with the provisions of the Convention must be rejected (para. 3). *Margarita Šijakova and Others v. the Former Yugoslav Republic of Macedonia*, Application no. 67914/01, Decision 6 March 2003.

24 Harris et al., 2018, pp. 742, 743, with reference to cases *Di Lazzaro v. Italy*, Application no. 31924/96, Decision 10 July 1997, *Akin v. Netherlands*, Application no. 34986/97, Judgment 4 July 2000, *E.B. v. France*, Application no. 43546/02, Judgment 22 January 2008, *Emonet and Others v. Switzerland*, Application no. 39051/03, Judgment 13 December 2007. As noted by the same authors, the most obvious interferences with the right to found a family are programmes of compulsory sterilisation or abortion, with reference to cases *N.B. v. Slovakia*, Application no. 29518/10, Judgment 12 June 2012, *V.C. v. Slovakia*, Application no. 18968/07, Judgment 8 November 2011, *McGinley and Egan v. The United Kingdom*, Application no. 10/1997/794/995-996, Judgment 9 June 1998, and *Boso v. Italy*, Application No. 50490/99, Judgment 5 September 2002.

extra-marital partners and children born in out of wedlock, as well as to cohabiting same-sex couples living in a stable *de facto* partnership.²⁵

In the words of K. Turković regarding Article 8 and Article 12,

‘these are two distinct albeit interrelated rights, between which there is a sharp contrast. While the essence of marriage for the purposes of the Convention is defined in minimalistic and formalistic terms as the formation of legal bonds between a single man and a single woman of a marriageable age and while the right to found a family does not arise under Article 12 in absence of marriage, assessment of ‘family life’ under Article 8 is qualitative, what matters is the substance of relationship, primarily real existence in practice of close personal ties’.²⁶

In this regard, C. Sörgjerd argues that both provisions of Articles 8 and 12 ‘protect the family as something of a cornerstone in society ... Article 8 prohibits interference with an existing relationship or family unit, whereas Article 12 governs the right to form family ties through marriage’.²⁷

Furthermore, it should be noted that unlike Article 8, Article 12 does not foresee any limitations, as are known in other human right instruments, in particular ones referring to race, nationality and religion. However, it should not be concluded that this right is absolute, since it is subjected to the discretionary powers of contracting

25 Cf. Shabas, 2015, p. 534. Article 8 of the ECHR reads: ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’ For example, in the case of *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 56) the Court stated that the first and the second applicant, having lived together for fifteen years in a heterosexual extra-marital union, constituted a family as an element which falls under Article 8 even if their relationship existed outside marriage. Also, in the case of *Keegan v. Ireland*, Application no. 16969/90, Judgment 26 May 1994 (para. 44) the Court recalls that the notion of the ‘family’ in the provision of Article 8 cannot be confined solely to marriage-based relationships and may encompass other *de facto* ‘family’ ties where people live together outside their marriage. A child born in such a relationship is automatically part of that ‘family’ from the moment of his or her birth and by the very fact thereof (c.f. also: case of *Kroon and Others v. the Netherlands*, Application no. 18535/91, Judgment 27 October 1994 (paras. 31–32)). Regarding application of Article 8 to same-sex couples, in the case of *Schalk and Kopf v. Austria*, 30141/04, Judgment 24 June 2010 (paras. 91–95) the Court, for the first time, stated that a cohabiting same-sex couple living in a stable *de facto* partnership enjoys protection of their ‘family life’ (cf. also: *P.B. and J.S. v. Austria*, Application no. 18984/02, Judgment 22 July 2010 (paras. 25–30)). However, Article 12 is still applied restrictively in this regard. In the aforementioned case of *Schalk and Kopf v. Austria*, 30141/04, Judgment 24 June 2010 the Court has established that ‘Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage’ (para. 101).

26 Turković, 2020, with reference to the case *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment 24 January 2017 (para. 140). Cf. also: Lucić and Grigić, 2015, pp. 78. and 80.

27 Sörgjerd, 2016, p. 32.

states. This means that contracting states may impose certain restrictions through their domestic laws, but the aim of such restrictions must be legitimate and proportionate to the goal which is to be achieved (e.g. prevention of incest and polygamy).²⁸ As defined in jurisprudence of the ECtHR, ‘the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.²⁹

As emphasised by the Court,

‘the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far’.³⁰

Therefore, ‘in examining a case under Article 12 the Court would not apply the tests of ‘necessity’ or ‘pressing social need’ which are used in the context of Article 8 but would have to determine whether, with regard being given to the State’s margin of appreciation, the impugned interference was arbitrary or disproportionate.’³¹ In other words,

‘with regard to marriage, the State has more extensive powers than in some other fields. This is particularly apparent when one compares the very brief and non-exhaustive reference to ‘national laws’ in Article 12 ... with the more

28 Sörgjerd, 2016, p. 32, pp. 32–33.; Korać, 1997, p. 341.; Rainey, McCormick and Ovey, 2020, p. 401.; Alinčić, 2013, pp. 25–26.

29 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (para. 50); *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment 27 September 1990 (para. 43); *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (para. 66).

30 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 88), with reference to *R. and F. v. the United Kingdom*, Application no. 35748/05, Judgment 28 November 2006.

31 Cf.: *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 90); *O’Donoghue and Others v. The United Kingdom*, Application no. 34848/07, Judgment 14 December 2010 (paras. 84 and 90); *Jaremowicz v. Poland*, Application no. 24023/03, Judgment 5 January 2010 (paras. 48, 50 and 53).; Cf. Harris, p. 736. and Rainey, McCormick and Ovey, 2020, p. 402. As noted in the case *Jaremowicz v. Poland*, Application No. 24023/03, Judgment 5 January 2010., ‘The essential element of the violation of Article 12 of the Convention alleged in the present case is not the scope of discretion afforded to the Polish authorities but the arbitrary fashion in which they exercised their decision-making power. The discretion available in theory may be very wide, but the decisive element is how it is applied in practice. In the applicant’s case the Convention breach was caused by the authorities’ failure to strike a fair balance of proportionality among various public and individual interests at stake in a manner compatible with the Convention, rather than by the absence of detailed rules on marriage in prison.’ (para. 64).

circumscribed and restrictive wording of the second paragraph of each of Articles 8, 9, 10 and 11...³²

Article 12 regulates the public law dimension of the right to marry. At a private law level, it is complemented by a special provision guaranteeing the equality between spouses, being integrated in Article 5 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms,³³ stipulating: Equality between spouses;

‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.’

As emphasised in the Explanatory Report, under the terms of this article,

‘equality must be ensured solely in the relations between spouses themselves, in regard to their person or their property and in their relationships with their children. The rights and responsibilities are thus of a private law character; the article does not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical, or labour laws’.³⁴

However, the second sentence contains – in the words of W. A. Shabas - the ‘necessity clause’,³⁵ since, as emphasised in the Explanatory Report, ‘the fact that the spouses shall enjoy equality of rights and responsibilities in their relations with their children shall not prevent States from taking such measures as are necessary in the interests of their children’.³⁶

Finally, ‘the words ‘in the event of its dissolution’ do not imply an obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution’.³⁷

32 Joint dissenting opinion of Judges Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pinheiro Farinha, Walsh, De Meyer and Valticos to the Judgment in the case *F. v Switzerland*, Application no. 11329/85, Judgment 18 December 1987.

33 European Treaty Series – No. 117.

34 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory report European Treaty Series – No. 117., para. 35.

Of course, as emphasised in the Report itself, it does not constitute an instrument providing an authoritative interpretation of the text of the Protocol (Preamble, I). Nevertheless, it definitely facilitates the understanding of its provisions.

35 Shabas, 2015, p. 1159.

36 Explanatory Report, para. 36.

37 Explanatory Report, para. 36.

3. A Short Historical Overview on the Development of the Right to Marry

The mid 20th century and the period after the Second World War were marked by the appearance and development of documents within the system of human rights protection.³⁸ This period witnessed the recognition of the right to marry and to found a family, as a content of firstly global and then also regional instruments. Hence, international legal sources, both global and regional, recognised, *inter alia*, ‘the right to conclude a traditional marriage as a model of multi-century heterosexual life union of woman and man, regulated by customs and law, being a foundation of the family with own biological progeny’.³⁹

‘The right to marry and to found a family has not been included in the catalogue of rights in the Convention without discussion. It was provoked by the opposition of those who believed that it was not a fundamental right, and it was considered that only fundamental rights could be included in the text of the Convention. Nevertheless, the argument prevailed that totalitarian regimes limited the freedom to marry and found a family by racial laws, which is completely unacceptable in democratic orders.’⁴⁰

Indeed, it has been noted that ‘the right to marry was largely an intervention of the Commission on human rights in the preparation of the Universal declaration of human rights’.⁴¹ Article 16 para. 1, as shall be mentioned *infra*, guarantees the right to marry and found a family to men and women of full age, without any limitation due to race, nationality or religion.

It should be emphasised, also elaborated *infra*, that

‘... the words ‘men and women’ replaced ‘everyone’ in order to ensure equal treatment and not – this is the modern-day gloss based on a simplistic reading of the text rather than the intent of those who crafted the provision – so as to reserve marriage to persons of opposite sex’.⁴²

Hence, the choice of wording was deliberate, as it was in the case in drafting the ECHR, which the ECtHR reiterated sixty years after its adoption:

38 Alinčić, 2013, p. 25. In the words of N. Hlača, the Second World War has awoken the conscience of the mankind, allowing for the supranational system of the protection of human rights. Hlača, 1993, p. 120.

39 Alinčić, 2013, p. 25.

40 Korać, 1996, p. 68.

41 Shabas, 2015, p. 528. For a very thorough analysis of the drafting of the provision, cf. Shabas., pp. 529–533.

42 Shabas, p. 528.

‘... The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to ‘everyone’ or state that ‘no one’ is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex’.⁴³

‘The link between the right to marry with the right to found a family at the time of genesis of the international documents on human rights (United Nations and Council of Europe) was based on the assumption and comprehension that marriage in many countries indeed is the most common basis of the family.’⁴⁴

In contemporary perspective, it can be said that both at the international and the national level,

‘marriage law regulates and guarantees the right to marry as well as its realisation on the basis of principles of equality of citizens before the law, equality of spouses and the respect and legal protection of personal and family life, dignity, reputation and honour.’⁴⁵

4. Comparison with Other Universal and Regional Human Rights Instruments Guaranteeing the Right to Marry

The right to marry, as a fundamental human right, is guaranteed and protected by a plethora of international documents. Such an approach clearly demonstrates the dedication to promotion and safeguarding of human right in contemporary societies. Changes in societies at all levels also cause the stipulation of ‘mirroring rights’, offering a new perspective on the issue of marriage.

At a global level, four documents should be emphasised. Firstly, the Universal declaration on human rights, which although of a non-binding nature, still represents a cornerstone of the system of human rights protection. The right to marry is herein described in Article 16 paras. 1 and 2 which define it as:

43 *Schalk and Kopf v. Austria*, Application no. 30141/04, Judgment 24 June 2010 (para. 55).

44 Alinčić, 2013, pp. 26–27.

45 Alinčić et al., 2007, p. 19.

- ‘1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.’

This provision hence guarantees the right to marry for men and women of full age, without any limitations with regards to racial, nationality or religious issues, and also guarantees the equality of the rights of spouses, as well as stipulating the principle of consensus. It is noted that this rather elaborated provision represents an exception with regards to the approach taken in the document as a whole.⁴⁶

Secondly, concerns the International covenant on civil and political rights, which echoes the principles of the Universal Declaration on Human Rights.⁴⁷ As for the right to marry and the corollary principle of equality of spouses, Article 23 Paragraphs 2–4 are of the utmost importance, defining:

- ‘2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.’⁴⁸

Thirdly, the Convention on the elimination of all forms of discrimination against women⁴⁹ defines in Article 16 that states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, such as:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities in a marriage and during its dissolution;

46 As W. A. Shabas notices, ‘as a general rule, the provisions of the Declaration are more laconic than the detailed texts of the subsequent treaties whose content it has inspired, but this is not the case with article 12’. Shabas, 2015, p. 529.

47 United Nations, Treaty Series vol. 999, p. 171. and vol. 1057, p. 407.

48 Para. 4 obviously served as a basis for Article 5 of the Protocol No. 7 to the ECHR, regarding the equality of spouses in marriage.

49 United Nations, Treaty Series, vol. 1249, p. 13.

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of children shall be paramount;

(g) The same personal rights as a husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

Last, but being of utmost value for the approach of the development of human rights in the 21st century, the Convention on the Rights of Persons with Disabilities (furthermore referred to as CRPD), guarantees the right of all persons with disabilities who are of marriageable age to marry and found a family on the basis of the consensus of spouses.⁵⁰ Article 23 of this document *inter alia* defines:

'States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized...'

At the European regional level, besides the ECHR, significant importance lies in the Charter of Fundamental Rights of the European Union (further: Charter).⁵¹ Although it did not introduce a new concept, but primarily relied on the provisions of the ECHR, it is important as a symbol of the dedication of the European Union towards the protection of human rights.

As S. Douglas-Scott notices,

'on balance, it seems beneficial that the EU has its own Charter of Rights, both for reasons of clarity and transparency. But a Charter of Rights is also important on a symbolic level – an EU Charter could conceivably develop as much significance as the US Bill of Rights or the European Convention, both beacons of individual protection. It might mark the EU's coming of age as a polity'.⁵²

On the other hand, a slightly less optimistic standpoint can be found emanating from other relevant authors. Thus, M. Antokolskaia argues that

50 United Nations, Treaty Series, vol. 2515, p. 3.

51 Official Journal of the European Union C 326/391, 26. 10. 2012.

52 Douglas-Scott, 2011, p. 656.

‘in contrast to the more than 50-year-old ECHR upon which it is built, the Charter could reasonably be expected not only to reflect the current level of protection, but also to upgrade it. It could also be expected systematically to fill all the gaps that have arisen from the piecemeal development of case law. However, at least with respect to family law, almost all these expectations have remained unjustified’.⁵³

Two provisions of this document deserve special attention. The first one is Article 9 which stipulates:

‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’

It should be concluded from the wording of Article 9, with ‘these rights’ in the plural form, that ‘the right to marry and the right to found a family’ constitute two separate rights which may or may not be interconnected.⁵⁴ This means that social shifts from the traditional family based on marriage have been taken into account while crafting this provision of the Charter, at the same time expressing a contemporary understanding that the right to found a family is not necessarily related only to the institute of marriage.⁵⁵

Furthermore, the ECtHR noted that ‘the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women’.⁵⁶

As C. McGlynn noticed almost a quarter of a century ago ‘such a provision leaves considerable ambiguity in interpretation and thus enlarges judicial discretion in the interpretation and development of rights, either progressively or regressively, with little control or direction from the Charter’.⁵⁷

Although it is clear that the element of heterosexuality, as a constitutive element of marriage, has been omitted from the provision of Article 9, the European union has continuously referred to the document entitled Explanations relating to the Charter, in which it is expressly stated:

‘This Article is based on Article 12 of the ECHR ... The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither

53 Antokolskaia, 2010, p. 411. The author notices: ‘The Charter contains no more than slight alterations regarding the right to marry and to found a family. Most surprisingly, the Charter has failed to incorporate the right to dissolve a marriage.’ Antokolskaia, 2010, p. 411.

54 Majstorović, Šimović and Hoško, 2022, p. 773.

55 Alinčić, 2013, pp. 28–29.; Lucić and Grigić, 2015, p. 74.

56 *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002 (para. 100).

57 McGlynn, 2001, p. 584.

prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.⁵⁸ (accentuated by the authors).

The second provision that should be emphasised is Article 53 which regarding the level of protection defines:

‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Member States’ constitutions’ (accentuated by the authors).’

Indeed, even before the Charter gained its binding nature, the (then) European Court of Justice defined that

‘the principal aim of the Charter, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights’.⁵⁹

In line with such a view is the standpoint of D. Hrabar who argues that most of the 54 articles of the Charter correspond to rights and principles contained within constitutions of EU member states and international documents.⁶⁰

58 Cf.: Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union, C 303/17, 14.12.2007.

59 Case C-540/03 *European Parliament v. Council of the European Union*, ECR 2006 I-05769 (para. 38). The idea that ‘international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law’ is present for decades now. Cf. Case 4-73 J. Nold, *Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*. ECR 1974 -00491, para. 13: ‘As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states’. However, trends in the jurisprudence of the Court of the European Union suggest a different trend, hardly a welcomed one. Cf. e.g.: Case C-673/16. *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*. ECLI:EU:C:2018:385.

60 Hrabar, 2013, p. 58.

With regards to the importance of the member states' constitutions, it should be noted that certain legal sources of the highest level explicitly guarantee the protection of the state to marriage and the family.⁶¹ D. Jakovac-Lozić notices that the constitutional protection of the family has been a common notion in Europe for more than a century now, and that even in European constitutions which do not mention family explicitly, the family is protected beyond any doubt by their respective civil and family-law codes as an institution upon which the real social values rest.⁶²

5. Case Law Analysis of the ECtHR With Regards to the Right to Marry and the Principle of Equality of Spouses

Article 12 of the ECHR, as noted by the ECtHR,

'secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. Both as to procedure and substance it is subject to the national laws of the Contracting States...'⁶³

The scope of the provision is clear. Namely,

'there is no positive duty on a state to provide the material conditions to make the right to marry effective. A state may foster marriage by granting benefits to married couples which it denies to single cohabitees but it is not obliged to do so. Nor is it under a duty to guarantee that married couples are not worse off than cohabitees in a similar position to them'.⁶⁴

61 Certain legislations go a step further than guaranteeing a special protection to the family, but also have particular acts in that regard. For instance, a family is in Hungary protected by an organic law – Law on the protection of the family No. CCXI (especially articles 1–25). Cf. Heka, 2013, p. 165.

62 Jakovac-Lozić, 2002, p. 51. The author also reminds of the Article 119 of the Constitution of the German Empire of 1919 (Die Verfassung des Deutschen Reichs), which, *inter alia*, reads: 'Marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the Constitution. It is based on the equality of both genders. It is the task of both the State and the communities to strengthen and socially promote the family.'

63 *F. v Switzerland*, Application no. 11329/85, Judgment 18 December 1987 (para. 32), *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (para. 50), *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002.

64 Harris et al., 2018, p. 739, with reference to *Marckx v. Belgium and F.P.J.M. Kleine Staarman v. The Netherlands*, Application no. 10503/83, Decision 16 May 1985.

In other words, ‘Article 12 cannot be made the vehicle for requiring positive social programmes from the state in support of the family’.⁶⁵ In this regard, N. Lucić and N. Grigić rightly conclude:

‘the Court justifiably states that there is nothing controversial in the fact that marriage and cohabitation do not always imply the same legal effects since partners can freely choose to conclude marriage or to live in cohabitation. In regard therewith, cohabitants and spouses accept the legal consequences of their decisions or differently said, they commit to and accept the legal effects of the form of a family union which they have decided to found.’⁶⁶

Furthermore, it should be reiterated that Article 12

‘does not apply to the marriage and relationships between spouses beyond the right to marry. Some aspects of marriage, including the right to choose a family name, may and have been examined under Article 8 alone or in conjunction with Article 14 of the Convention’.⁶⁷

It is therefore no surprise that Article 12

‘has generated a relatively small number of Court judgements.’⁶⁸ One reason for this has been its limited textual scope, which to its credit the Court has largely made good by its broad and dynamic interpretation of the rights to respect for private and family life in Article 8. ... A second reason has until recently been the Court’s restriction in Article 12 of the right to marry to individuals of the biological opposite sex and of the right to found a family to married couples.’⁶⁹

This means that the ECtHR practice is being accommodated by the changes in social relations ‘by expanding the scope of Article 8 of the ECHR far beyond the scope of the

65 Harris et al., 2018, p. 742 with reference to *Andresson and Kullmann v. Sweden*, Application no. 11776/85, Judgment 22 August 1985.

66 Lucić and Grigić, 2015, p. 80.

67 Guide to Article 12, 2024, pt. 12, with reference to *Burghartz v. Switzerland*, Application No. 16213/90, Judgment 22 February 1994, and *Ünal Tekeli v. Turkey*, Application no. 29865/96, Judgment 16 November 2004.

68 Judge Nußberger in the Separate opinion to the Judgment in the case *Delecalle v. France* notices: ‘Whereas in hundreds of judgments the Court has widened the guarantees of Article 8, transforming them into a kind of ‘umbrella protection’, it has treated the interpretation of Article 12 as a ‘poor relation’. However, if the right to marry were not governed by a separate provision it could just as easily fall within the ambit of Article 8...’ In other words, as mentioned in literature, ‘although closely connected with the notions of ‘family life’ and ‘private life’ in Article 8, which have been interpreted imaginatively, the Court ... has not been so receptive to developing the content of Article 12.’ Harris et al., 2018, p. 735.

69 Harris et al., 2018, p. 744.

traditional marriage concluded between two people of the opposite sex', in that way encouraging the social and legal perception of these changes.⁷⁰

Of course, Article 12 does not guarantee an unlimited right to marry since, as the Court upheld in the case of *B. and L. v The United Kingdom*, this right is regulated by 'the national laws' governing its exercise and is subject to limitations, although national laws could not restrict nor reduce the right to such an extent that its very essence was impaired.⁷¹

5.1. The Right to Marry and Its Limitations

As defined in well-established case law of the ECtHR,

'the Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy'.⁷²

In legal theory, a consideration of limitations by *D. Harris et al.* might serve as a basis of further examination.⁷³ Namely, they suggest that as to procedural limitations, those 'relate mainly to publicity and solemnization of marriage', and as to substance 'the state may impose limitations on such matters as marriageable age, consanguinity, the number of spouses, consent and capacity'.⁷⁴

With regards to the procedural limitations, states can require marriage to be entered into as a civil marriage, however they are free to recognise religious marriages according to their national laws. Namely,

'the Court has reiterated that marriage is not considered simply as form of expression of thought, conscience or religion protected under Article 9 of the Convention, but is governed by the specific provision of Article 12 of the Convention, which refers to the national laws governing the exercise of the right to marry'.⁷⁵

70 Lucić and Grigić, 2015, p. 80.

71 *B. and L. v. The United Kingdom*, Application No. 36536/02; Judgment 13 September 2005 (paras. 34–41). Hence, Article 12 of the Convention, as well as Article 5 of the Protocol 7 to the Convention can be defined as 'relatively protected derogable rights.' Omejec, 2013, pp. 843 and 846 et seq.

72 *Frasik v. Poland*, Application No. 22933/02, Judgment 5 January 2010 (para. 89); *F. v Switzerland*, Application no. 11329/85, Judgment 18 December 1987 (para. 32); *Jaremowitz v. Poland*, Application no. 24023/03, Judgment 5 January 2010 (para. 49).

73 Harris et al., 2018, pp. 736. Similarly: Shabas, 2015, p. 533.

74 Harris et al., 2018, p. 736.; Cf. also: Sörgjerd, 2016, pp. 32–33.; Korać, 1997, pp. 341. and 365–367.; Rainey, McCormick and Ovey, 2013, p. 401.; Alinčić, 2013, pp. 25–26.

75 Guide to Article 12, 2024, pt. 7.

Simultaneously, states are free to exercise discretion to recognise a religious marriage.⁷⁶ The limitations as to their substance are analysed in continuance.

5.1.1. Marriageable Age

As W.A. Shabas emphasises, the concept of marriageable age ‘does not seem to have led to any litigation’.⁷⁷ In many countries, it is possible to marry even before reaching full age, but mainly with the approval of the court in such cases. Without such ‘safety mechanisms’, child marriages represent a breach of rights of the child⁷⁸ and discrimination of women in particular.⁷⁹ In this regard, it should be noted that even the Convention on the Rights of the Child (further: CRC) does not explicitly prohibit child marriages. The provisions of the CRC (Article 24 para. 3 in relation to Article 2 para. 1) are often read as tacitly permitting child marriages, but only in exceptional circumstances.⁸⁰

In countries in which the legal position of children born to married parents is equal to the legal position of children born out of wedlock, the reasons for allowing the entering into a marriage of a minor (as a rule above the age of 16) probably lie in social reasons, namely the intention of the legislator not to further deteriorate the position of young mothers, in particular linked to the possible stigma as a result of pregnancy before reaching full age. Another possible reason as to why such an exception could be allowed is ‘respecting the child’s evolving capacities and autonomy in making decisions that affect his or her life’.⁸¹

The ECtHR has rarely addressed the issue of child marriages directly. In the case of *Khan v. the United Kingdom* the Court found that religious a marriage involving a 14-year-old girl cannot be considered simply as a form of expression of thought, conscience or religion, without taking into consideration the internal rules of contracting states governing preconditions for access to the right to marry, as expressly prescribed by Article 12.⁸² Thirty years later, in the case of *Z.H. and R.H. v. Switzerland* the ECtHR found that

‘Article 8 cannot be interpreted as imposing an obligation to recognise a marriage – religious or otherwise – contracted by a 14-year-old girl. Nor can such

76 Guide to Article 12, 2024, pt. 8., with reference to *Muñoz Diaz v. Spain*, Application No. 49151/07, Judgment 8 December 2009.

77 Shabas, 2015, p. 537.

78 Cf. United Nations Children’s Fund, 2023.

79 In that regard, it should be emphasised that Art. 16 Para. 2 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates: ‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.’

80 Khazova and Dawit Mezmur, 2019, p. 317.

81 Khazova and Dawit Mezmur, 2019, p. 317.

82 *Khan v. The United Kingdom*, Application no. 11579/85, Judgment 7 July 1986. For a detailed analysis of this case cf.: Fenton-Glynn, 2021, pp. 35–38.

an obligation be derived from Article 12, which expressly provides for the regulation of marriage by national law'.⁸³

The Court also noted that importance needs to be attached to the protection of children and the fostering of their secure family environment, as well as to the fact that it 'must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society'.⁸⁴

Due to the recent migration crisis that raised a number of unsettled questions pertaining to child marriages, this phenomenon of child marriages has an international dimension too, which is confirmed by the German legislative process, as reflected in the Civil Code (Bürgerliches Gesetzbuch).⁸⁵ Namely, in 2017 Germany adopted the Act to Prevent Child Marriages.⁸⁶ In 2024, the scope of protection is widened by means of the adoption of the Act on the protection of minors with regards to the marriages concluded abroad.⁸⁷

5.1.2. Consanguinity

As noted in the jurisprudence of the ECtHR, limitations on the right to marry may include 'substantive provisions based on generally recognised considerations of public interest', *inter alia* in particular concerning prohibited degrees of affinity.⁸⁸

For instance, in the case of *B. and L. v. The United Kingdom* the applicants, who are father-in-law and daughter-in-law, complained that they were prohibited from marrying each other, invoking Articles 12 and 14 of the Convention. In this particular case, the Court reflected on the inherent limitations of family law. Namely, as emphasised in paras. 37 and 38 of this Judgement, although this

'bar on marriage is aimed at protecting the integrity of the family (preventing sexual rivalry between parents and children) and preventing harm to children who may be affected by the changing relationships of the adults around them, contemporaneously the bar on marriage does not prevent the relationships occurring'.

83 *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, Judgment 8 December 2015 (para. 44). Cf.: Fenton-Glynn, 2021, p. 37.

84 *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, Judgment 8 December 2015 (para. 44). 85 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 11. Juni 2024 (BGBl. 2024 I Nr. 185).

86 Gesetz zur Bekämpfung von Kinderehen Vom 17. Juli 2017, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 48, ausgegeben zu Bonn am 21. Juli 2017, p. 2429. It was found 'incompatible with the Basic Law due to the failure to address the legal consequences of the invalidation of child marriages concluded abroad and the lack of possibility for a marriage to be recognised as valid after the age of majority is reached.' Cf.: Bundesverfassungsgericht, 2023.

87 Gesetz zum Schutz Minderjähriger bei Auslandsehen vom 24. Juni 2024, Bundesgesetzblatt, Teil I 2024 Ausgegeben zu Bonn am 27. Juni 2024 Nr. 212.

88 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010. (para. 89).

The Court concluded that a breach of Article 12 occurred.

The case of *Theodorou and Tsotsorou v. Greece* concerned the applicants who were brother- and sister-in-law respectively, whose marriage was annulled due to their close affinity.⁸⁹ The Court noted the existence of a consensus within the member states of the Council of Europe regarding the impediment to marriage of (former) sisters- and brothers-in-law, namely only two member states at that point (Italy and San Marino) had introduced such an impediment to marriage, and to which consensus ‘the Court attaches particular importance’ (para. 30).⁹⁰ In this case, the Court concluded that

‘it appears that the applicants are currently deprived of all the rights granted to married couples, which they nevertheless enjoyed for ten years’ and hence concluded that ‘in the circumstances of the case, the recognition of the nullity of the applicants’ marriage disproportionately restricted their right to marry to such an extent that that right was impaired in its very essence. There has therefore been a violation of Article 12 of the Convention’. (paras. 35 and 36 respectively).

5.1.3. *Number of Spouses*

The European legal circle has always been characterised by monogamy, deeply rooted in national traditions. Several cases before the ECtHR deserve special attention in that regard. Firstly, the case of *Johnston and Others v. Ireland*, in which the European Court of Human Rights stated that in any society espousing the principle of monogamy, ‘it is inconceivable’ that any person should be able to marry as long as his previous marriage has not been dissolved.⁹¹

Secondly, in the case of *F. v. Switzerland*, the Court noted that ‘Article 12 ... does not distinguish between marriage and remarriage’ (para. 33). In that regard, the Court reiterated ‘that the stability of marriage is legitimate aim which is in public interest’ (para. 36) and that

‘a delay imposed, before getting married, on persons of full age and otherwise fulfilling the conditions for marriage under national law, be it as a civil

89 *Theodorou and Tsotsorou v. Greece*, Application no. 57854/15, Judgment 5 September 2019. On this case, cf. Kovaček Stanić and Samardžić, 2020, p. 554.

90 On the historical and comparative development of the institute of marriage restrictions, cf. Hlača, 2001, pp. 481–491. and also: Kovaček Stanić and Samardžić, 2020, pp. 549–555.

91 *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 50). As Judge Pinheiro Farinha emphasises in his Declaration to the Judgment in this case, an additional sentence should have been added to the explanation: ‘The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy.’, proposing the argumentation as follows: ‘This is a citation from paragraph 40 of the Marckx judgment of 13 June 1979, the omission of which might cause the present judgment to be interpreted – incorrectly – as meaning that the Court attaches no importance to the institution of marriage.’

sanction or the practical consequence of such a refusal as in the instant case, cannot be considered justified under Article 12 of the Convention' (para. 97).

Furthermore, the Joint dissenting opinion of Judges Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pinheiro Farinha, Walsh, De Meyer and Valticos offers another perspective:

'The restriction thus placed on the exercise by the applicant of his right to marry and found a family did not affect the substance of that right. It was merely temporary. It was neither arbitrary nor unreasonable. It was based on legitimate reasons and could be considered to be commensurate with their gravity. It did not go beyond the powers of the competent national authorities. ... In order for it to be concluded that there has been a breach of this right, it must be shown that the State has impaired the essence of the right or that it has restricted the exercise thereof in an arbitrary or unreasonable manner. That has not been shown in this case.'

Thirdly, the case of *V. K. v. Croatia*, where the ECtHR noted that 'the Croatian legal system adheres to the principle of monogamy, and does not allow individuals who are already married to conclude another marriage' and continued:

'Therefore, a failure on the part of the domestic authorities to conduct divorce proceedings with the required urgency may impair the right to marry of an individual who has, for example, sought to have his previous marriage dissolved in order to marry again, or who has acquired a serious and genuine opportunity to remarry after he had instituted divorce proceedings'.⁹²

Hence, the principle of monogamy reflects the consensus of the European family law systems. On the other hand, keeping contact ever more often with systems which allow for polygamous marriages, a remark is in order. Namely, the Court has made clear that

'Article 12 expressly provides for regulation of marriage by national law, and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, this Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society.'⁹³

92 *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012 (para. 100).

93 *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, Judgment 8 December 2015 (para. 44): 'The usual conflict-of-laws rule is that the *lex loci celebrationis* applies. Thus, a state may recognise polygamous marriages celebrated lawfully abroad while not allowing them under its own law'. Cf. Harris et al., 2018, p. 737, footnote 20, referring to *X. v. Switzerland*, Application no. 16744/14, Judgment 26 January 2017.

5.1.4. Consent

The issue of consent in contemporary societies does not solely signify the free will of a person as one of the necessary preconditions for a marriage. Indeed, it also must be taken into consideration with regards to entering into marriage having another goal in mind, different than that of entering into a life union. Therefore, one of the main challenges, especially with regards to the recent migration crisis are marriages of convenience.

Such marriages, in words of S. Winkler ‘lack at least one of the structural elements, namely the establishing of a life union’.⁹⁴ Also, these marriages are entered into with the aim of achieving other goals, different from establishing a life union with the other spouse, whose goals ‘could not be achieved (or could be more difficult to achieve) without the marital status’.⁹⁵ The aim is mostly found in the fraudulent acquisition of certain benefits regarding rights *in rem*, hereditary interests or certain tax exemptions, or very concrete effects such as acquiring residence permits or citizenship.⁹⁶

‘States attempt to regulate through a range of measures the use of marriage that is undertaken solely for the purpose of permitting one of the partners to immigrate or to regularize a particular status.’⁹⁷ In that regard, as W. A. Shabas notices ‘The Court has said that States are entitled ‘to prevent marriages of convenience, entered solely for the purpose of securing an immigration challenge.’⁹⁸ However, as the Court warns,

‘the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice.’⁹⁹

94 For example, Croatian Aliens Act partially regulates so-called ‘marriage of convenience’ and regulates that the temporary residence permit for the purpose of family reunification shall not be issued if the marriage is entered into for convenience (Art. 68), as well as regulates that foreign citizens can be expelled from the country if he/she represents a danger for the public order or public health if, *inter alia*, ‘enters into a marriage of convenience’. Aliens Act, Official gazette, nos. 133/2020, 114/2022, 151/2022.

95 Winkler, 2016, p. 497.

96 Winkler, 2016, p. 497.

97 Shabas, 2015, p. 540.

98 Shabas, 2015, p. 540. with reference to *O’Donoghue and Others v. The United Kingdom and Sanders v. France*, Application no. 31401/96, Decision 16 October 1996.

99 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 89).

On the other hand, it should be emphasised that ‘reasonable limitations requiring the provision of information that will establish the genuineness of the marriage are permissible, even though they may delay the marriage’.¹⁰⁰

5.1.5. Capacity

‘The right to marry can be subject to prior authorisation, owing to the restriction on a person’s legal capacity, one of the substantive limitations the relevance of which is acknowledged in the case-law.’¹⁰¹

In the case of *Lashin v. Russia*, the applicant complained in particular about his status as a legally incapacitated person, his non-voluntary commitment to a psychiatric hospital and his inability to marry.¹⁰² Regarding the applicable law, it should be stated that the Family Code of the Russian Federation of 1995 made it ‘impossible to marry if at least one of the would-be spouses had been declared incapable by a court because of a mental illness’ (para. 63). As mentioned *supra*, Article 23 Paragraph 1 of the CRPD establishes that ‘the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised’.

100 Certain systems have long withheld historically known solution of preventing a woman to enter into a new marriage within 300 days since the termination of the previous one. It was formerly explained by the theory of the so-called *perturbatio sanguinis*, namely the intention of the legislative solution to prevent any doubt whatsoever as regards the paternity of the child born within this period. In that regard, the ECtHR concluded ‘that the requirement that divorced women, on account of potential pregnancy, observe a 300-day waiting period before remarrying unless they can prove by way of a medical examination that they are pregnant constitutes direct discrimination on grounds of sex that is not justified by the aim of preventing uncertainty as to the parentage of a possible unborn child’. *Nurcan Bayraktar v. Türkiye*, Application no. 27094/20, Judgment 6 November 2023, paras. 90-92. In this case, the Court found ‘that the unequal treatment to which the applicant was subjected on the ground of her sex was neither objectively justified nor necessary’ and that ‘there has therefore been a violation of Article 14 read in conjunction with Article 12 of the Convention’. It seems though that the Court avoided certain delicate topics and kept the ‘safe’ approach. Hence, Judge Krenč in his Concurring opinion to this Judgment expressed regret for the Court’s choice of words, emphasising that ‘On such matters involving gender equality, the Court’s speech must be truthful and accurate. Truthful because these issues are fundamental with regard to the Convention; accurate because the Court has a crucial pedagogical role’.

101 Guide to Article 12, 2024, pt. 19.

102 *Lashin v. Russia*, Application no. 33117/02, Judgment 22 January 2013 (para. 3). He suffered from schizophrenia, due to which he was concluded to be ‘incapable of understanding the meaning of his actions and was unable to control them’ (paras. 7 and 9 respectively). In 2000, the competent court declared him legally incapacitated because of his illness, in regards to which the attempts by his daughter and father (as guardian) were made to restore his legal capacity, which were refused. In 2002, the applicant and his fiancée requested that the municipality register their marriage, and claimed that they had not received any reply from the municipality (para. 20). Later that year, they wrote letters to the court informing it of their desire to marry (para. 39).

The Court recalled that ‘deprivation of legal capacity may amount to an interference with the private life of the persons concerned’.¹⁰³ Hence, it was the intention of the ECtHR to ‘examine whether a fair balance was struck between his Article 8 rights and any other legitimate interest, private or public, which may have been at stake’ (para. 79). The Court reiterated that ‘depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure’ (para. 80). The extent of the state’s margin of appreciation depends on two major factors.

‘First, where the measure under examination has such a drastic effect on the applicant’s personal autonomy as in the present case, the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure.’¹⁰⁴

The conclusion of the Court was that a breach of Article 8 had occurred. Consequently, the Court observed that

‘the applicant’s inability to marry was one of many legal consequences of his incapacity status... In other words, the applicant was unable to marry primarily because of the same two major factors analysed under Article 8, namely the deficiencies in the domestic decision-making progress and the rigidity of the Russian law on incapacity. In view of its findings under Article 8 of the Convention, the Court considers that there is no need for a separate examination under Article 12 of the Convention’ (para. 124).

Indeed, although a separate examination did not occur, the Court’s message is nevertheless very strong. It reminds states of the importance of maintaining high standards in the protection of human rights of such vulnerable individuals, consequently diminishing the state’s margin of appreciation, having in mind ‘the higher value’, i.e. the protection of human rights.

The same line of reasoning was kept, i.a. in the case of *Delecolle v. France*. In this case, the applicant complained that he had been denied the right to marry on the grounds that his marriage had been subject to the authorisation of his supervisor or the guardianship judge, since at the age of 72 he was placed under enhanced protective supervision (*curatelle renforcée*) for five years (paras. 3 and 4 respectively). His attempts to lift the measure were unsuccessful. He requested the supervisor’s authorisation to marry a friend who had become his partner during the previous year.

103 *Lashin v. Russia*, Application no. 33117/02, Judgment 22 January 2013 (para. 77). About the impact of deprivation of legal capacity on the private life of a person, cf: Majstorović and Šimović, 2018, pp. 75-77.

104 *Lashin v. Russia*, Application no. 33117/02, Judgment 22 January 2013 (para. 81), references to the case-law here omitted.

The supervisor refused authorisation, claiming that she had known the applicant only for a few months and therefore lacked necessary information (para. 6). The guardianship judge ordered a social inquiry and, having undertaken all necessary action, dismissed the request, noting that no one disputed applicant's attachment to the women he intended to marry, but that it was 'insufficient to justify authorising the planned wedding' and that the 'planned marriage as it stood was not in the applicant's interests' (para. 12). The court of appeal concluded that 'the psychopathological turn in his disorders and his failing perception of the realities of his finances¹⁰⁵ were such that she could not give his informed consent to marriage'. (para.13).

The Court found that, although the right to marry of persons under supervision is subject to prior authorisation, they are not deprived of it (para. 54). Furthermore, it concluded 'having regard to the foregoing considerations, and in the light of the circumstances of the case and of the margin of appreciation available to domestic authorities' that 'the restrictions on the applicant's right to marry did not limit or reduce that right in an arbitrary or disproportionate manner' and consequently 'there was no violation of Article 12 of the Convention' (para. 62).¹⁰⁶

5.2. The Principle of Equality of Spouses

The case-law regarding the Article 5 of Protocol no. 7 has always been rather rare, as noted by the Court a quarter of a century ago. Namely, in the case of *Cernecki v. Austria*, the Court underlined that

'the scarce case-law which exists so far on Article 5 of Protocol No. 7 shows that it essentially imposes a positive obligation on States to provide a satisfactory legal framework under which spouses have equal rights and obligations concerning such matters as their relations with their children'.¹⁰⁷

It is considered that Article 5

105 Judge Nußberger in her Separate opinion emphasised: 'It is clear that if he had been poor no one would have objected to his planned marriage' and continued 'in my view, the right to marry, in the presented case, was unduly reduced to a purely financial decision and was consequently disproportionately restricted, affecting its very essence. The authorities completely disregarded the social and personal aspects of marriage. The fact is that those aspects were what counted for the applicant.' Judge Nußberger also noted: 'It is true that the risk of a person with a 'slight cognitive disorder', 'psychological fragilities' and 'some degree of vulnerability' (para. 9 of the judgment) being exploited by third persons should not be under-estimated, particularly where such person is a large property holder. However, a restrictive measure adopted against the will of the person concerned should not, in my opinion, go beyond what is strictly necessary. Although the content of Article 460 (1) of the Civil Code is unobjectionable as such, its application in the circumstances of the present case, which resulted in a ban on marriage, is disproportionate. The measure in question is more paternalistic than protective, which is incompatible with Article 12 read in the light of Article 8' and that therefore she voted for a finding of a violation of Article 12.

106 On this case, cf. Korać Graovac, 2023, pp. 110-111.

107 *Cernecki v. Austria*, Application no. 31061/96, Decision 11 July 2000.

‘does not prevent States from taking such measures as are ‘necessary in the interests of the children’. According to the Explanatory Report on Protocol No. 7, the case-law of the Convention organs, relating *inter alia* to Article 8 of the Convention, where they have stressed the need to take account of the interests of the child, is to be noted in this connection. The Court, therefore, considers that the necessity clause contained in Article 5 of Protocol No. 7 should be interpreted in the same way as the necessity clauses contained in other provisions of the Convention.’¹⁰⁸

Therefore, the Court recalled that according to well-established case-law the notion of necessity implies that the interference complained of corresponded to a pressing social need, and in particular that it was proportionate to the legitimate aim pursued. In determining the necessity of an interference, a margin of appreciation is left to the contracting states. This margin of appreciation is not however, unlimited and in exercising its supervisory function, the Court must determine whether the reasons adduced to justify the interference at issue are ‘relevant and sufficient.’¹⁰⁹ In this very case, the application was rejected as being manifestly ill-founded and hence declared inadmissible. The same line of reasoning was maintained in subsequent rulings.¹¹⁰

In the case of *Jonche Blazheski and Vide Blazheska v. Northern Macedonia*, the Court considered the right to a welfare benefit under Article 5 of Protocol 7, namely whether it is of ‘a private law character’. The conclusion was that the dispute ‘does not fall in the sphere of private law’ and hence declared the complained inadmissible as incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto.¹¹¹

In certain cases, the Court found that the complaints raised under Article 5 of Protocol 7 in reality reiterated the complaints raised under Article 8. Therefore, since they are closely linked, the former ones do not warrant a separate examination and hence the relevant part of the applications were rejected as manifestly ill-founded.¹¹²

5.3. ECHR as a Living Instrument - Marriage as Solely a Heterosexual Union?

Apart from being a ‘Charter of liberty’, the ECHR is contemporaneously also ‘a living instrument’. As noted by G. Letsas, ‘the idea that the ECHR is a living instrument that must be interpreted according to present-day conditions has been a central

108 *Cernecki v. Austria*, Application no. 31061/96, Decision 11 July 2000.

109 *Cernecki v. Austria*, Application no. 31061/96, Decision 11 July 2000.

110 E.g. in the case *Iosub Caras v. Romania*, Application no. 7198/04, Judgment 27 July 2006 (paras. 55–58).

111 *Jonche Blazheski and Vide Blazheska v. Northern Macedonia*, Application no. 38692/16, Decision 7 September 2023.

112 E.g. in the *Dorca v. Romania*, Application no. 59651/13, Decision 15 April 2014 (paras. 27 and 28).

feature of Strasbourg’s case law from its very early days’.¹¹³ In the words of J. Kokott, ‘this living instrument has undergone remarkable developments, reflecting at the same time changes across our societies’ and the willingness of the Court to reassess its prior judgements in light of such changes and developments.¹¹⁴ One issue which attracts particular attention is to the right to marry and found a family, taking into consideration that the time is ripe to reconsider the heterosexuality of spouses as a fundamental characteristic of marriage. In this regard, Harris et al. reiterate: ‘The question whether marriage is limited to unions between a man and woman has arisen in two situations: marriages between a transsexual and another; and marriages of same-sex couples.’¹¹⁵

As A. Korać noted almost thirty years ago, cases in which the ECtHR applied the provision of Article 12 to transsexual persons were always particularly interesting to legal scholars, as these cases were an example of how a provision of Article 12 could be interpreted differently, in line with the method of dynamic and evolutive interpretation of the ECHR as a living instrument.¹¹⁶ The starting opinion of the Court in its earlier case law was that the right to marry as guaranteed by Article 12 referred to ‘the traditional marriage between persons of opposite biological sex’ and that the general aim was ‘to protect marriage as the basis of the family’.¹¹⁷ Furthermore, the Court found that an

‘attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage, this being a matter encompassed

113 Letsas, 2012, p. 2. The author emphasises that ‘in the hands of the ECtHR, the idea of a living instrument has three main features. First, the Court will take into consideration ‘present-day standards’ as an important factor in interpreting the Convention; it will very rarely inquire into what was thought to be acceptable state conduct when the Convention was drafted, or into what specific rights the drafters of the Convention intended to protect. Second, the present-day standards that the Court takes into consideration must somehow be common or shared amongst contracting states. The Court has never clarified what it means for a standard to be common or shared ... the Court does not make it a condition that all contracting states have expressly accepted the standard by way of legislative enactment. Third, the Court will not assign decisive importance to what the respondent state (be it its authorities or public opinion) considers to be an acceptable standard in the case at hand. This is so particularly if the respondent state’s practice is out of line with the commonly accepted standards in the Council of Europe. Over time however, the European Court has shifted the emphasis it places on the various aspects of the living instrument approach’. Letsas, 2012, p. 2. More about the ECtHR’s dynamic and evolutive approach to interpretation of the provisions of the Convention, cf.: *Tyrer v. The United Kingdom*, Application no. 5856/72, Judgment 24 April 1978; *Stafford v. the United Kingdom*, Application no. 46295/99, Judgment 28 May 2002 (para. 68); *Schalk and Kopf v. Austria*, Application no. 30141/04, Judgment 24 June 2010 (para. 94).

114 Kokott, 2020, p. 1.; Cf. also: Fenton-Glynn, 2021, p. 6.

115 Harris et al., 2018, p. 739.

116 Korać, 1997, pp. 343–344.

117 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (paras. 49–50).

within the power of the Contracting States to regulate by national law the exercise of the right to marry'.¹¹⁸

However, in 2002, the Court changed its previous standpoint regarding transsexual persons' access to marriage and pointed to the fact that there had been 'major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality'.¹¹⁹ This is why, in the case of *Christine Goodwin v. The United Kingdom*, the Court for the first time found that denying transsexual persons who had undergone gender-reassignment surgery the right to marry someone of the opposite sex constituted a breach of Article 12 of the Convention (paras. 101 and 103–104 respectively). It is obvious that the Court heavily relied on 'a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals' considering this to be sufficient reason to reassess its prior judgements (*Rees, Cossey, Sheffield and Horsham*) in light of new social changes and developments.¹²⁰

Regarding same-sex couples and the level of protection granted to such relationships, it must be said that this poses a complex issue and is a good example of the method of dynamic and evolutive interpretation of provisions of the ECHR (Articles 8 and 12). Notwithstanding the fact that there are a considerable number of contracting states that have extended marriage to same-sex partners, it should be noted that 'this reflects their vision of the role of marriage within their societies and does not originate from the interpretation of the fundamental right prescribed by Article 12, that the contracting states established by the ECHR'.¹²¹

Such a standpoint of legal theory is based on the case law of the ECtHR, from which it follows that the Court has enhanced the protection of the rights of same-sex couples through a more extensive interpretation of Article 8, but still remained firm in the restrictive application of Article 12 and the interpretation of the issue of access to marriage. In the case of *Schalk and Kopf v. Austria* the Court emphasised that it would 'no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex', but ultimately came to a conclusion that 'the question whether or not to allow same-sex marriage is left to regulation by the national law of the contracting state'. The Court

118 *Cossey v. The United Kingdom*, Application No. 10843/84, Judgment 27 September 1990 (paras. 43 and 46–48); *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (paras. 66–68).

119 The Court also emphasised that Article 9 of the Charter departed from the wording of Article 12 of the Convention in removing the reference to men and women. Cf.: *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002 (para. 100).

120 *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002 (paras. 84–85). Cf. also: Sörgjerd, pp. 34–35.; Renucci, J-F.: Introduction to the European Convention on Human Rights, The rights guaranteed and the protection mechanism, Council of Europe Publishing, Strasbourg, 2005, p. 40.

121 Dimovski, 2021, p. 175.

also observed that ‘marriage has deep-rooted social and cultural connotations which may differ largely from one society to another’ and for that reason ‘it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’ (paras. 61–62). In conclusion, the Court noted that Article 12 of the ECHR does not impose an obligation to grant same-sex couples access to marriage and, thus, found no violation of Article 12 (paras. 63–64).

The Court maintained a similar approach to this issue in the cases of *Vallianatos and Others v. Greece*, *Hämäläinen v. Finland*, *Oliari and Others v. Italy*, and *Chapin and Charpentier v. France*.¹²² Although, the Court acknowledged that same-sex couples were in need of legal recognition and protection of their relationship, in the case of *Oliari and Others v. Italy* it ultimately drew a conclusion that

‘in the absence of marriage, same-sex couples ... have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection’ (para. 174).

In the case of *Orlandi and Others v. Italy*, the Court did not depart from its aforementioned position, reiterating that domestic legislations that provide ‘civil unions a legal status equal or similar to marriage ... *prima facie* suffice to satisfy Convention standards’ (paras. 191–194),¹²³ and whose position has been firmly kept in further decisions on the matter.

6. Analysis of the Case Law of the ECtHR in Terms of Central and Eastern European Countries

The case law of the Court in regard this group of countries with regards to the right to marry, as protected by Article 12 of the ECHR reflects the social and political changes, as well as the efforts undertaken to harmonise national legal systems with the European standards. It also reflects the constant interaction between the ‘conservative’ and ‘progressive’ family ideologies, which are, as M. Antokolskaia puts it, ‘clearly of a

122 *Vallianatos and Others v. Greece*, Application nos. 29381/09 and 32684/09, Judgment 7 November 2013 (paras. 91–92); *Hämäläinen v. Finland*, Application no. 37359/09, Judgment 16 July 2014 (paras. 96–97 in connection with paras. 85–89); *Oliari and Others v. Italy*, Application nos. 18766/11 and 36030/11, Judgment 21 July 2015 (paras. 174–175, 177–178 and 185–187); *Chapin and Charpentier v. France*, Application no. 40183/07, Judgment 9 June 2016 (paras. 36–40).

123 *Orlandi and Others v. Italy*, Application nos. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment 14 December 2017.

pan-European nature, since they both have their own rank and file in each European country'.¹²⁴

This interaction is in the continuance analysed from three perspectives. The first perspective concerns religious marriages, which is a topic of particular importance for former socialist countries. The second perspective offers considerations regarding the intended aim of marriage, taking into account both the fundamental characteristics of a marriage as well as the aspirations of the spouses. The third perspective is the one focusing on the issue of divorce, not only from the standpoint of the issue whether the right to marry incorporates the right to divorce, but also from the perspective of the development of social relations and the (de)stigmatisation of marriage.

6.1. Religious Marriages

The issue of religious marriages was quite important in former socialist states. Namely, at some point of the development of marriage law, certain states introduced the institute of non-existent marriage in order to avert the citizens to conclude religious marriages and to obey the obligatory civil form of marriage.

'The obligatory form of marriage was strengthened by the almost autonomous concept of non-existent marriage within civil, socialist codification. The reason for introducing such a level of coercion was exactly due to the fear of *matrimonia clandestina*, or secret marriages, but this time entered into exclusively before the representatives of religious communities.'¹²⁵

Contemporary issues point to another perspective, namely the one supported by Article 9, para. 1 of the ECHR, guaranteeing freedom of thought, conscience and religion.¹²⁶ As confirmed in the jurisprudence of the ECtHR, Article 9, para. 1 ECHR 'cannot be interpreted so as to impose an obligation on States to have the effects of

124 Antokolskaia, 2008, p. 29.

125 As N. Hlača notices, marriage legislation of the Federal People's Republic of Yugoslavia was among a few countries which included provisions and sanctions determining the category of non-existent marriages, referring also to M. Stevanov who claimed that the Polish Law on family and guardianship of 1964 contained the same provision. Cf. Hlača, 2006, pp. 1061 and 1064 respectively.

126 Article 9 of the ECHR reads:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

religious marriages recognised as equal to those of civil marriages'.¹²⁷ However, if there is a possibility foreseen by the state for religious marriages, it has to be exercised without discrimination.

The case of *Savez crkava 'Riječ života' and Others v. Croatia* originated from an application lodged by the Union of Churches 'The Word of Life', Church of the Full Gospel and the Protestant Reformed Christian Church in the Republic of Croatia against Croatia in 2007. The applicant churches alleged that the refusal of the Government of Croatia to conclude an appropriate agreement with them and the resulting inability, among other, to obtain state recognition of religious marriages conducted by them had breached their right not to be discriminated against in the exercise of their freedom of religion and the rights set forth by the law (para. 3).¹²⁸

Therefore, although Croatia is not obliged under Article 9 of the Convention to recognise religious marriages, 'the fact of the instant case nevertheless falls within the wider ambit of that Article' (para. 58). The applicant churches emphasised that agreements were concluded with numerous religious communities with regard to which the Court noted that 'conclusion of agreements between the state and a particular religious community establishing a special regime in favour of the latter does not, in principle, contravene the requirement of Articles 9 and 14', of course 'provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other religious communities wishing to do so' (para. 85).

The Court found in this case that

'the difference in treatment between applicant churches and those religious communities which had concluded agreements on issues of common interest ... and were therefore entitled ... to have religious marriages they performed recognised by the State did not have any 'objective and reasonable justification' (para. 92).

Hence the Court accordingly found a violation of Article 14 of the Convention taken in conjunction with Article 9 (para. 93). Consequently, the Agreement on issues of

127 *Savez crkava 'Riječ života' and Others v. Croatia*, Application no. 7798/08, Judgment 9 December 2010 (para. 56), with reference to *X. v. Germany*, Application no. 6167/73, Decision 18 December 1974, Decisions and Reports (DR) 1, pp. 64–65; *Khan v. The United Kingdom*, Application no. 11579/85, Decision 7 July 1986, DR 48, pp. 253 and 255; *Spetz and Others v. Sweden*, Application no. 20402/92, Decision 12 October 1994; and *Şerife Yiğit v. Turkey*, Application no. 3976/05, Judgment 2 November 2010 (para. 102).

128 Namely, the relevant state bodies claimed that 'the applicant churches did not satisfy, either individually or jointly, historical and numerical criteria', that is that 'they had not been present on the territory of Croatia since 6 April 1941 and the number of their adherents did not exceed 6,000' (para. 9). Apart from the historical and numerical criterion, the cultural criterion demanded that the religious communities were 'historical religious communities of the European cultural circle'. (paras. 74 and 75 respectively).

common interests was concluded between the applicant churches and the Government of the Republic of Croatia in 2014.¹²⁹

6.1.1. *The Intended Aim of Marriage*

In the case of *Frasik v. Poland*, the applicant alleged in particular a breach of Article 12 on account of the national court's refusal to grant him leave to marry in prison and a breach of Article 13¹³⁰ in that he had had no domestic remedy to challenge that refusal (para. 3). The case concerned a prisoner, convicted for violent behaviour against a woman, who expressed her wish to marry him while he was imprisoned and also asked the court to absolve her from the duty of testifying against him, due to their particularly close personal relationship (para. 25), in other words, she relied on testimonial privilege.

While in prison, the applicant asked the trial court to grant him leave to marry the victim in the remand centre, which was refused. The Supreme court held that the refusal

‘constituted a violation of Article 12 of the Convention. Nevertheless, in the Supreme Court's view, this kind of – admittedly serious – breach of the law on the part of the trial court did not have any bearing on the applicant's conviction and could not result in it being quashed’ (para. 41).

The ECtHR emphasised that

‘personal liberty is not a necessary pre-condition for the exercise of the right to marry. Imprisonment deprives a person of his liberty and also – unavoidably or by implication – of some civil rights and privileges. This does not, however, mean that persons in detention cannot, or can only very exceptionally, exercise their right to marry. As the Court has repeatedly held, a prisoner continues to enjoy fundamental human rights and freedoms that are not

129 Official gazette, No. 112/2014.

It is interesting to mention that the applicant churches also complained that their inability to celebrate marriages with the same effect as civil marriages had violated their rights under, *inter alia*, Article 12. The Court reiterated that ‘solely the members of a religious community, as individuals, can claim to be victims of a violation of the right to marry or the right to education, rights which by their nature are not susceptible of being exercised by a religious community itself’. Therefore, the applicant churches as religious communities cannot themselves allege a violation of either of these rights (cf.: *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, Application no. 11533/85, Decision 6 March 1987, DR 51, p. 125, and *Scientology Kirche Deutschland e.V. v. Germany*, Application no. 34614/97, Decision 7 April 1997), from which it follows ‘these complaints are incompatible *ratione personae* with the provisions of the Convention’ (paras. 125 and 126 respectively).

130 Article 13 of the ECHR reads:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

contrary to the sense of deprivation of liberty, and every additional limitation should be justified by the authorities'.¹³¹

Having all the afore mentioned in mind, the Court concluded that there had been a violation of Article 12. Indeed, the Court noted:

'The choice of a partner and the decision to marry him or her, whether at liberty or in detention, is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision.' (para. 95).

Even if certain doubts might remain regarding the true will and intentions of future spouses, both in this case and in general, it is indeed an inherent limitation of family law. Therefore, the considerations regarding the intention of the spouses, as already accentuated, have to be made with the utmost sensitivity.

Another case was conducted simultaneously with the Frasik case, 'in the interests of the proper administration of justice', namely the case of Jaremowitz v. Poland. In this case, the applicant was imprisoned, as well as his intended wife. He alleged a breach of Article 12 in that he had been refused leave to marry in prison, as well as Article 13 on account of the fact that he had had no domestic remedy to challenge that refusal. Unlike applicant Frasik, applicant Jaremowitz invoked Article 14, maintaining that he had been discriminated against on the ground of his status as a prisoner (para. 3).

The Court emphasised, that

'under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners' rights, including their right to establish a marital relationship with the person of their choice, based purely on such arguments as what – in the authorities' view – might be acceptable to or what might offend public opinion' (para. 53).

Moreover, it stressed the following:

'Except for overriding security considerations and in order to ensure that the right to marry is exercised 'in accordance with the national laws' – which ... must themselves be compatible with the Convention – the authorities are not allowed under Article 12 to interfere with a prisoner's decision to establish a marital relationship with a person of his choice, especially on the grounds

131 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 with reference to *Hirst (No. 2) v. The United Kingdom*, Application No. 74025/01, Judgment 6 October 2005 (para. 69).

that the relationship is not acceptable to them or deviates from prevailing social conventions and norms.’ (para. 59)

Having in mind the aforementioned, the Court concluded that there had been a violation of Article 12. The question of the general social consensus on the features of the marriage, such as its aim, also applies to the question of divorce, which is analysed in continuance.

6.1.2. *The Divorce*

As noted by the ECtHR,

‘the ordinary meaning of the words ‘right to marry’ is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to ‘national laws’; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12.’¹³²

Although Article 12 is inspired by Article 16 para. 1 of the Universal declaration of human rights, as mentioned *supra*, the *travaux préparatoires* confirm that the last sentence of this provision (“They are entitled to equal rights as to marriage, during marriage and at its dissolution.”) was not included in Article 12. Hence, it is the opinion of the Court that there was ‘no intention to include in Article 12 any guarantee of a right to have the ties of marriage dissolved by divorce’.¹³³

The noted sentence was nevertheless incorporated in Article 5 of the Protocol No. 7 to the ECHR, stipulating, as already stated:

‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution (accentuated by the authors). This article shall not prevent States from taking such measures as are necessary in the interests of the children.’

132 *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 52).

133 *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 52).

However, it should be emphasised that the ‘the words ‘in the event of its dissolution’ do not imply and obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution’ (para. 39).¹³⁴

In states which allow for a divorce, two issues deserve particular attention. The first is the efficiency of the procedures, since delays in divorce proceedings could also be understood as a breach of the right to marry. In other words, ‘the failure to conduct divorce proceedings within a reasonable time could also, in certain circumstances, raise as issue under Article 12 of the Convention’.¹³⁵ The second issue is the one of the results, namely, ‘Article 12 can also not be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of a law allowing for divorce’.¹³⁶

As regards the efficiency of the procedures, the following remarks are in order. In the case of *V. K. v. Croatia*, the applicant complained that ‘the lengthy divorce proceedings had impaired his right to marry again’ (para. 94).¹³⁷ The Court noted that

‘a failure on the part of the domestic authorities to conduct divorce proceedings with the required urgency may repair the right to marry of an individual who has, for example, sought to have his previous marriage dissolved in order to marry again, or who has acquired a serious and genuine opportunity to remarry after he had instituted divorce proceedings’ (para. 100).

With regards to the breach of Article 12, the Court noted that the restriction was a result of the well-argued rejection of the divorce request, which relied on the principle of monogamy, hence it concluded that the right to marry was not breached and that the complaint should be rejected as manifestly unfounded (para. 67). The Court reminded the domestic courts of their already ‘existing obligation to conduct the divorce proceedings diligently and expediently’ (para. 104). It also noted that ‘in these particular circumstances the applicant was left in a state of prolonged uncertainty which amounted to an unreasonable restriction of his right to marry,’ which

134 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory report European Treaty Series – No. 117.

135 Guide to Article 12, 2024, pt. 53., with reference to *Aresti Charalambous v. Cyprus*, Application no. 43151/04, Judgment 19 July 2007 and *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012.

136 Guide to Article 12, 2024, pt. 47., with reference to *Aresti Charalambous v. Cyprus*, Application no. 43151/04, Judgment 19 July 2007 and *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012.

137 *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012.

in turn lead the Court to conclude that ‘there has been a violation of Article 12 of the Convention’ (paras. 106 and 107 respectively).¹³⁸

The second issue deserving particular attention is that of the results, in other words the outcome of the proceedings. In the case of *Ivanov and Petrova v. Bulgaria* the two applicants (intending to marry each other) alleged the breach of rights as guaranteed by the Convention.¹³⁹ The first applicant alleged that the decision by which the domestic courts rejected his request for divorce represented a breach of Article 6, Paragraph 1 and of Article 8 respectively. Both applicants claimed that they suffered an unjustified restriction on their right to marry¹⁴⁰ and they also complained about the absence of remedies within national system, as protected by Article 13 of the Convention. The European Court of Human Rights concluded that the domestic courts did not fail in their obligation to provide reasoning for the decision of rejecting the divorce request, and that consequently there was no violation of Article 6 Paragraph 1 ECHR.

In the case of *Chernetskiy v. Ukraine*, the applicant claimed ‘that the restrictions on his right to remarry during his detention in prison had been contrary to Article 12 of the Convention’.¹⁴¹ Meaning that his previous marriage had been divorced during his incarceration, but he had not obtained a divorce certificate, since it could have been obtained exclusively by the applicant at the relevant civil status registry. He requested to be escorted to the registry, but his request was refused and he was informed that he would be able to obtain it after his release from prison. After more than three and a half years, the competent ministry issued an order providing a temporary procedure for registering divorces and issuing divorce certificates in prison. When provided with the certificate, the applicant remarried. The ECtHR concluded that ‘given the circumstances of the case ... the restriction at issue was unjustified and impaired the very essence of the applicant’s right to marry and found a family with his new female partner’ and that there has been a violation of Article 12.¹⁴²

138 It should be noted that Judge Berro-Lefevre in Partially dissenting opinion made strong arguments to the contrary, to which we adhere. Namely, as emphasised in this opinion: ‘Will all violations of Article 6 for unreasonable length of proceedings entail, *ipso facto*, a violation of Article 12 if the applicant can demonstrate that he or she has found another soul mate or is contemplating a fresh attempt at matrimony?’ and concluded ‘the applicant has been able to marry, admittedly at a later date than he would have wished, and his religious convictions have thus been respected.’ (paras. 6 and 7 respectively).

139 *Ivanov and Petrova v. Bulgaria*, Application no. 150017/04, Judgment 14 June 2011.

140 Bulgarian law, as defined in the Judgment (para. 26), recognises two cases of divorce: divorce for alteration of the marital bond and divorce by mutual consent of the spouses. The national court concluded that the alteration of the marital bond was the consequence of the applicant’s unacceptable behaviour, including adultery, as evidence by the birth of a child born to him and his new partner (para. 16). Furthermore, the attempts of the first applicant to obtain a divorce by mutual consent also failed and he had lived with the new partner without being able to formalise their relationship (para. 24).

141 *Chernetskiy v. Ukraine*, Application no. 44316/07, Judgment 8 December 2016 (para. 3).

142 *Chernetskiy v. Ukraine*, Application no. 44316/07, Judgment 8 December 2016, (paras. 33. and 34 respectively).

In the case of *Piotrowski v. Poland*, ‘the applicant complained under Articles 8 and 12 of the Convention that by refusing to grant him a divorce, the authorities had breached his right to respect for his private life and prevented him from marrying someone else’ (para. 28).¹⁴³ The Court noted that his ‘argument is not based on an absolute impossibility to obtain a divorce under family law in Poland but on a dismissal of his divorce action by the domestic courts’ (para. 48). Furthermore, the Court emphasised:

‘if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce’ (para. 53).

In other words, ‘that in the circumstances of the present case the positive obligations arising under Article 8 of the Convention ... did not impose on the Polish authorities a duty to accept the applicant’s petition for divorce’ (para. 54).¹⁴⁴

In the case of *Babiarz v. Poland*, the applicant, similarly to the case of *Piotrowski v. Poland*, complained ‘under Articles 8 and 12 of the Convention that by refusing to grant him a divorce the authorities had prevented him from marrying the woman with whom he had been living’ (para. 32).¹⁴⁵ The ECtHR came to the same conclusion, namely that

‘if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce’. (para. 56).

143 *Piotrowski v. Poland*, Application no. 8923/12, Decision 15 December 2016.

144 Therefore, the Court found that the application was manifestly ill-founded and hence declared inadmissible.

145 *Case Babiarz v. Poland*, Application no. 1955/10, Judgment 10 January 2017. Cf. Heri, 2017.

The Court found that there has been no violation of Article 12 of the Convention by five votes to two.¹⁴⁶

In the case of *Mihaela Mara Pătrăuceanu-Iftime v. Romania*, the applicant, among other alleged breaches of the Conventional rights, claimed under Article 5, Protocol 7 to the Convention, ‘that her request for a divorce had been refused in order to protect her husband in his capacity as a priest’.¹⁴⁷ The Court, being master of the characterisation to be given in law to the facts of the case,¹⁴⁸ decided to examine the complaint from the standpoint of Article 8 alone, in which regard the Court considered that ‘the positive obligations arising under Article 8 of the Convention did not impose a duty on the national authorities to accept the applicant’s petition for divorce as formulated by her’. (para. 41).

7. Summary

The right to marry represents a fundamental human right, protected primarily for its significance in the founding of families. Family has always been understood as one of the basic values in a life of an individual, but also as one of the basic values of society as well for its great contribution in preserving social stability and development. The right to marry is guaranteed and protected by a plethora of international documents, the Universal Declaration on Human Rights (Art. 15), the International Covenant on Civil and Political Rights (Art. 23), the Convention on the Elimination of All Forms of Discrimination Against Women (Art. 16), CRPD (Art 23), Charter (Art. 9), as well as the ECHR (Art. 12). Such an approach clearly demonstrates the dedication to the promotion and safeguarding of this human right in contemporary societies.

146 Judge Sajó noted: ‘I see no reason why the State should be able to force citizens to live in a partnership contrary to their choosing. A marriage between two citizens cannot provide the State with the prerogative of its perpetuation once one of the parties has taken the private and family life decision not to continue living under such a legal bond – even more so with the irretrievable conditions and length in this particular case’ (para. 22). Judge Pinto de Albuquerque accentuated: ‘Article 12 of the Convention does not protect the right to terminate a marriage on demand. If national law allows for divorce, Article 12 secures for divorced persons the right to remarry. The prohibition on divorce may be an admissible restriction to the right to remarry if it is couched in clear terms and applied in a proportionate way. This was not the case. In Poland, the law provides for the right to divorce, but the legal requirements are so vague that they transform the right to remarry into a legal fiction. In fact, the very essence of the applicant’s right to remarry was impaired, due to a restrictive interpretation and strict application of the law in his case. The long agony of the applicant’s marriage is a telling example of the human costs of this legal fiction both for the spouses and for the third persons affected’ (para. 35).

147 *Mihaela Mara Pătrăuceanu-Iftime v. Romania*, Application no. 30777/14, Decision 8 January 2019 (para. 28). Cf.: Grgurev, 2020, pp. 203–219.

148 Cf. *Radomilja and Others v. Croatia*, Application nos. 37685/10 and 22768/12, Judgment 20 March 2018 (para. 114), and in particular the Joint partly dissenting and partly concurring opinion of Judges Yudkivska, Vehabović and Kūris and the Joint dissenting opinion of Judges De Gaetano, Laffranque and Turković.

The ECHR stipulates in Article 12 that ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’. Unlike other articles of the ECHR, this article does not foresee any limitations, however, it should not be concluded that this right is absolute, since it is subjected to the discretionary powers of contracting states. This means that contracting states may define certain restrictions in their national legislations, but the aim of such restrictions must be legitimate and proportionate to the goal which is to be achieved. As defined in the jurisprudence of the ECtHR, ‘the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.¹⁴⁹

As defined in the well-established case law of the ECtHR,

‘the Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy’.¹⁵⁰

In legal theory, a consideration of limitations by D. Harris et al. might serve as a basis for further examination.¹⁵¹ Namely, they suggest that regarding procedural limitations, those ‘relate mainly to publicity and solemnization of marriage’, and regarding substance, ‘the state may impose limitations on such matters as marriageable age, consanguinity, the number of spouses, consent and capacity’.¹⁵² Indeed, as emphasised by the Court,

‘the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far’.¹⁵³

149 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (para. 50); *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment 27 September 1990 (para. 43); *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (para. 66).

150 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 89); *F. v. Switzerland* (para. 32.); *Jaremowicz v. Poland* (para. 49).

151 Harris et al., 2018, pp. 736.

152 Harris et al., 2018, pp. 736. Cf. also: Sörgjerd, 2016, pp. 32–33.; Korać, 1997, pp. 341. and 365–367.; Rainey, McCormick and Ovey, 2020, p. 401.; Alinčić, 2013, pp. 25–26.

153 *Frasik v. Poland*, Application no. 229 R. and F. v. *the United Kingdom*, Application no. 35748/05, Judgment 28 November 2006.

Article 12 regulates the public law dimension of the right to marry. At a private law level, it is complemented by a special provision guaranteeing equality between spouses, being integrated in Article 5 of the Protocol No. 7 to the ECHR, stipulating:

‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.’

As N. Hlača notes, ‘family law provisions are by nature civilisational provisions which prove that law is a cultural phenomenon (and need) adapting to reality’.¹⁵⁴ The legal regulation of the right to marry and to found a family confirms this assumption. As Judge Turković emphasised:

‘The Court has often chosen to follow and not to lead on various issues of social tradition. It is cautious, it endorses the changes taking place at the national level. However, the Court has also demonstrated that it is also prepared to trigger rather than to endorse the change relying on the concept of emerging consensus, proportionality test or balance of harms test emphasising the loss minority will suffer if measure is not introduced. The Court would obviously need the overwhelming consensus to change the traditional institution of marriage.’¹⁵⁵

In that regard, a cautious approach can only be welcomed,¹⁵⁶ particularly having in mind the very nature of ‘the right to marry, the field of matrimony being so closely bound up with the cultural and historical traditions of each member country’.¹⁵⁷

154 Hlača, 1999, p. 403.

155 Turković, 2020, pp. 5, 6. Similarly: Harris et al., 2018, p. 741.

156 This being particularly so, if a different approach is taken into account, namely the one of the Court of the European Union. As J. Kokott, the former Advocate General at this Court noted: ‘... courts can at one and the same time act as mouthpieces of the law and as social engineers’. Kokott, 2020, p. 4. On challenges deriving from the concept of court as social engineers, cf. e.g. Hrabar, 2019, pp. 133–162.

157 As emphasised e.g. by Judge Nußberger in the Separate opinion to the Judgment in the case *Delecalle v. France*, Application no. 37646/13, Judgment 25 October 2018.

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